

Montana Water Court
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FILED
05/09/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
39E-0106-R-2022
Block, Nathaniel
4.00

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
BOX ELDER CREEK BASIN (39E)
PRELIMINARY DECREE

CLAIMANTS: Jamie S. Walker; Jessica R. Walker

CASE 39E-0106-R-2022

39E 172999-00

39E 173000-00

39E 30133832

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

FINDINGS OF FACT

1. The above-captioned claims appeared in the Preliminary Decree for Box Elder Creek (Basin 39E) with the following issue remarks:

39E 172999-00:

CLAIM FILED LATE 06/24/1982 . IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

RESERVOIR RECORD WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 113 TIMES THE CAPACITY OF THE RESERVOIR.

39E 173000-00:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE AND DITCH CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

39E 30133832:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 39E DECREE ISSUED 02/01/1985.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 08/27/2019 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY TRAVIS J WALKER.

2. On March 17, 2022, the above-captioned claims were consolidated into Water Court Case 39E-0106-R-2022 and the claimants or potential owner were ordered to work with the Department of Natural Resources and Conservation (DNRC) to resolve the issue remarks on the claims.

3. On June 30, 2022, the DNRC filed a Memorandum detailing several proposed modifications to claim 39E 172999-00 that would resolve the issue remarks placed on the claim. The Memo stated that the “DNRC is unable to make a recommendation on the resolution of point of diversion issue remark” in regards to claim 39E 173000-00.

4. The Memo recommended that claim 39E 172999-00 be modified as follows:

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESWSE	31	1N	60E	CARTER
Period of Diversion:	MARCH 10 TO OCTOBER 15 JANUARY 1 TO DECEMBER 31					
Diversion Means:	DAM DIKE					
Reservoir:	ON-STREAM					
	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
		SESWSE	31	1N	60E	CARTER
Diversion to Reservoir:	DIVERSION # 1					
Dam Height:	6.00 FEET					
Depth:	3.00 FEET					
Surface Area:	1.10 ACRES					
Current Capacity:	1.32 ACRE- FEET					
	THE CAPACITY, DAM HEIGHT, MAXIMUM DEPTH, AND SURFACE AREA HAVE BEEN ESTIMATED BY DNRC.					
Period of Use:	MARCH 10 to OCTOBER 15 JANUARY 1 TO DECEMBER 31					

5. On January 6, 2023, an Order Setting Filing Deadline was issued requiring the claimants to file documentation supporting the historical usage of the point of diversion for claim 39E 173000-00. The Order stated that “[f]ailure to comply with this filing deadline will be viewed as agreement that the claim should be dismissed”. Nothing was filed by the deadline.

6. If potential owner Travis Walker believes he has an ownership interest in claim 39E 30133832 he should contact the DNRC Regional Office in Billings to update ownership.

PRINCIPLES OF LAW

1. The Montana Water Court has the authority to determine the extent of all water rights in the state as they existed prior to July 1, 1973. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 367 P.3d 732; §§ 85-2-233, -102(12), MCA.

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

3. Active participation by water users, especially claimants, is imperative for the accuracy of the statewide adjudication effort. *In re Korman*, 2014 Mont. Water LEXIS 17, *6. Further, “[t]he time required to process these cases is extended substantially when litigants do not comply with deadlines imposed by the Court.” *Huntsman v. Huntsman Ranch Co.*, 2015 Mont. Water LEXIS 2, *6. It is within the power of this Court to terminate a water right claim if a claimant fails to participate. Rule 22. W.R.Adj.R.

CONCLUSIONS OF LAW

1. The claimants have failed to participate meaningfully in this case, despite being given opportunity to do so. *See Order Consolidating Case and Order Setting Deadlines Pursuant to Section 85-2-248(5), MCA*, March 17, 2022; *Order Setting Filing Deadline*, January 6, 2023. Accordingly, the record supports the adoption of the modification discussed above as a sanction for failing to comply with this Court’s previous Order and to resolve the issue remarks on claim 39E 172999-00. Claim 39E 173000-00 should be dismissed as a sanction for failing to comply with this Court’s previous Order and to resolve the issue remarks on the claim.

2. The remaining issue remarks are notice type remarks that have served their purpose and should be removed from the claims.

RECOMMENDATION

1. Upon review the record in this case, the above-captioned claims should be modified as discussed above. The issue remarks should be removed from the claims.

Post Decree Abstracts of Water Right Claims are attached to this Master’s Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Jamie S. Walker
Jessica R. Walker
PO Box 431
Ekalaka, MT 59324

Potential Owner:

Travis J. Walker
PO Box 244
Ekalaka, MT 59324

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOXELDER CREEK
BASIN 39E

Water Right Number: 39E 172999-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: JAMIE S WALKER
PO BOX 431
EKALAKA, MT 59324

JESSICA R WALKER
PO BOX 431
EKALAKA, MT 59324

Priority Date: FEBRUARY 10, 1943

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 06/24/82 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 150.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 75.00

Source Name: UNNAMED TRIBUTARY OF BOXELDER CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SE	31	1N	60E	CARTER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DIKE

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	40.00		SE	31	1N	60E	CARTER
2	29.00		SW	32	1N	60E	CARTER
3	6.00	4	NW	3	1S	60E	CARTER

Total: 75.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

172999-00

173000-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOXELDER CREEK
BASIN 39E**

Water Right Number: 39E 173000-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: DISMISSED

Owners: JAMIE S WALKER
PO BOX 431
EKALAKA, MT 59324

JESSICA R WALKER
PO BOX 431
EKALAKA, MT 59324

Priority Date:

Type of Historical Right:

Purpose (use): IRRIGATION

Flow Rate:

Volume:

Source Name: BOXELDER CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOXELDER CREEK
BASIN 39E

Water Right Number: 39E 30133832 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: JAMIE S WALKER
PO BOX 431
EKALAKA, MT 59324

JESSICA R WALKER
PO BOX 431
EKALAKA, MT 59324

Priority Date: APRIL 23, 1929

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: UNNAMED TRIBUTARY OF BOXELDER CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			5	1S	60E	CARTER
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		SENE	5	1S	60E	CARTER
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		NWSW	3	1S	60E	CARTER
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
4		S2	4	1S	60E	CARTER
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
5		S2NW	4	1S	60E	CARTER
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1				5	1S	60E	CARTER
2			SENE	5	1S	60E	CARTER
3			NWSW	3	1S	60E	CARTER
4			S2	4	1S	60E	CARTER
5			S2NW	4	1S	60E	CARTER